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Description		Form Used: Memo	
Subject		Date/Time	
Hearing re: citizen lawsuits		10/01/2004 02:51 PM	
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1	1,818,193		Kimberly Wells
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Body

Document Body

John - attached is a PDF file containing the testimonies given at the House subcommittee hearing by Fort Bragg, CASA and Chris Westhof representing AMSA. Although they were not invited to testify, you'll see letters submitted by the City of LA, the Regional Board and the Water Keepers Alliance. The e-mail attached below contains the subcommittee's announcement of the hearing.

CITY OF FORT BRAGG.PDF

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09/29/2004 11:42 AM

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 Subject: Hearing witnesses

U.S. House Committee on Transportation and Infrastructure

U.S. Rep. Don Young, Chairman

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September 28, 2004

Congressional Hearing To Examine Whether Citizen Suits Filed Under The Clean Water Act Are Being Misused

Washington, D.C. – The possibility that some citizen suits filed under the Clean Water Act are being misused and have no environmental benefit will be the subject of a Congressional hearing on Thursday.

The hearing by the U.S. House Water Resources and Environment Subcommittee, chaired by **U.S. Rep. John J. Duncan, Jr. (R-TN)**, is scheduled to begin at **10 a.m. on Thursday, September 30, 2004 in 2167 Rayburn House Office Building**. A live video broadcast of the hearing will be available at the Committee's website:

www.house.gov/transportation

Thursday's Witnesses

- Honorable Jere Melo; Mayor, Fort Bragg, CA

- Mark Dellinger; Special Districts Administrator, Lake County, California;
representing the California Association of Sanitation Agencies

- Christopher M. Westhoff; Assistant City Attorney, Department of Public Works General Counsel, Los Angeles, California;
representing the Association of Metropolitan Sewerage Agencies

Background Information

The Federal Water Pollution Control Act, or "Clean Water Act", makes unlawful the discharge of pollutants into navigable waters, unless the discharge is authorized by, and in compliance with, a National Pollution Discharge Elimination System (NPDES) permit issued by the U.S. Environmental Protection Agency (EPA) or by a State.

The holder of a Federal NPDES or State-issued permit is subject to an enforcement action by EPA or a State for failure to comply with the conditions of the permit. In the absence of Federal or State enforcement, a citizen who has an interest that may be adversely affected may commence a civil action under "citizen suit" provisions included in the Clean Water Act against any person alleged to be in violation of the conditions of an NPDES permit or a Federal or State

order. The Clean Water Act sets out certain instances where citizen suits are barred, including where either the State or EPA is concurrently maintaining an action over the same alleged violation.

The U.S. Supreme Court has observed that the bar on citizen suits when government enforcement action has been taken or is under way “suggests that the citizen suit is meant to supplement rather than to supplant governmental action.” Citizen suits are proper only “if the Federal, State, and local agencies fail to exercise their enforcement responsibility.”

The Federal Courts of Appeals are not uniform in determining whether a State’s enforcement action and issuance of an enforcement order bars a citizen suit under the Clean Water Act. In some Circuits, a State’s enforcement action and issuance of an enforcement order bar a Clean Water Act citizen suit.

This, however, is not the case in States such as California, which are within the jurisdiction of the Court of Appeals for the Ninth Circuit. The Ninth Circuit has interpreted the Clean Water Act’s language strictly and has held that the existence of an enforcement action, alone, will not bar a citizen suit for the same violations unless EPA or the State has commenced and is diligently prosecuting a judicial action or an administrative action to assess penalties, or the alleged violator has actually paid an administrative penalty.

Potential For Misuse Of Citizen Suits

Congress envisioned that citizen enforcement of the Clean Water Act would be a useful supplement to government agency oversight, given limited resources at both the State and Federal levels and the potential that some States might not be sufficiently vigorous in implementing the law. Many citizen lawsuits have been filed since enactment of the Act in 1972 and have played a positive role in addressing water quality issues in a number of instances.

Concerns have been raised, however, that some citizen suits do little or nothing to enhance water quality because the suits involve violations that are already being addressed in an enforcement action with government regulators and/or that they focus on what can be characterized as minor, sporadic, or technical violations. Concerns also have been expressed that citizen suits are subject to being misused, for example, when a citizen suit and the threat of very substantial litigation costs and penalties associated with it are used to exact payment of significant settlements, including sizeable plaintiffs’ attorney fees. The bases for these concerns are that such citizen suits have little or no economic or environmental value added and the substantial transaction and settlement costs associated with such suits would divert funding from necessary infrastructure and environmental projects.

Recent experiences reported in the State of California illustrate some of these problems. Numerous third party citizen lawsuits have been brought against communities in California alleging Clean Water Act violations even though State regulators already may have taken enforcement action against the communities.

Regulators sometimes decline to assess administrative penalties against a municipality, particularly if they are fairly small and have only limited financial resources. The regulators often prefer to allow the community’s limited resources to be directed at improvements that will prevent future violations and improve water quality. However, even though the regulators have exercised their enforcement powers in these cases, citizen suits are still allowed to proceed in the Ninth Circuit when penalties were not sought.

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